Supreme Court, U.S.
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NO. 89-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner

v.

CLARENCE LEE BRANDLEY,
Respondent

On Petition for Writ of Certiorari To the Texas Court of Criminal Appeals

BRIEF IN OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI

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To The Honorable Justices Of The Supreme Court:

NOW COMES CLARENCE LEE BRANDLEY, Respondent, by and through his counsel of record, Mike DeGeurin, and files this Brief in Opposition to State's Petition for Writ of Certiorari and in support thereof would respectfully show this Honorable Court as follows:[1]

STATEMENT OF THE CASE

In 1981, Clarence Brandley was convicted of capital murder and sentenced to death in Conroe, Montgomery County, Texas. The Texas Court of Criminal Appeals

1. For purposes of this Brief in Opposition, the Respondent will be referred to as "Clarence Brandley" or "Brandley." The Petitioner will be referred to as "Montgomery County".

affirmed Brandley's conviction on direct appeal in 1985. *Brandley v. State,* 691 S.W.2d 699 (Tex. Crim. App. 1985). (The opinion has been included in Montgomery County's Petition for Writ of Certiorari as Appendix D.)

Beginning in 1986, substantial new evidence surfaced indicating that another individual, not Clarence Brandley, committed the murder for which Clarence Brandley had been awaiting execution on Texas' death row. Based in part on the new evidence supporting Brandley's innocence, a Second Application for Writ of Habeas Corpus was filed on March 20, 1987, six days before Brandley was scheduled to die by lethal injection. (The Second Application for Writ of Habeas Corpus is included in the Appendix for Respondent as Exhibit A.)

Over the objections of the Montgomery County District Attorney, the trial court granted a stay of execution so that Brandley's claims could be reviewed prior to his death. The Texas Court of Criminal Appeals thereafter entered an order directing the trial court to conduct an evidentiary hearing on each issue raised in Brandley's writ application. (The order is included in the Appendix for Respondent as Exhibit B.) The order further directed the trial court to make findings of fact as to each issue, including Clarence Brandley's claim that he is innocent.

Pursuant to the order of the Texas Court of Criminal Appeals, the trial court heard testimony from 46 witnesses, in addition to extensive video and audio tape evidence, in a 10 day hearing totaling 10 volumes and over 1700 pages in the record, exclusive of exhibits. Also pursuant to the order of the Texas Court of Criminal Appeals, the trial court then filed findings of fact and conclusions of law totaling 47 pages, as to each claim raised by Brandley. (The trial court's findings of fact and conclusions of law, entitled "Order", are included

in the Appendix for Respondent as Exhibit C.) In its findings of fact, the trial court recommended that the Court of Criminal Appeals set aside Brandley's capital murder conviction. Specifically, the trial court found that Clarence Brandley is innocent of the crime for which he was convicted and that Montgomery County obtained Brandley's conviction through the use of witness intimidation, perjured testimony, suppression of exculpatory evidence, and an investigation which was conducted not to solve the crime, but to convict Brandley.[2] The trial court additionally found that Brandley, who is black, was the victim of racial discrimination in Conroe, Montgomery County, Texas, which impermissibly infected the fairness of the proceedings against Brandley.

After receiving the findings of fact from the trial court, the Court of Criminal Appeals ordered that briefs be filed and then conducted oral argument. The Court thereafter issued its opinion on December 13, 1989, setting aside Brandley's conviction. The Texas Court of Criminal Appeals specifically recognized in its opinion "the overwhelming evidence supporting the trial court's findings."[3] *Ex Parte Brandley,* 781 S.W.2d 886, 888 n.1. (Tex. Crim. App. 1989). (The opinion is included in Montgomery County's Petition for Writ of Certiorari as Appendix A.)

Clarence Brandley was released from custody on January 23, 1990, after spending nine years on Texas' death

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2. Regarding Brandley's first claim for relief, that the application of the death penalty constitutes cruel and unusual punishment because he is innocent, the trial court found "that credible and probative new evidence exists which establishes, by a preponderance of the evidence, that Petitioner is innocent of the crime for which he is now under the sentence of death." Appendix for Respondent, Exhibit C, at 2.

3. This Court should accord the trial court's findings of fact the presumption of correctness. Congress intends deference by federal courts to factual determinations of all State courts. *Sumner v. Mata,* 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981); *cf.* 28 U.S.C. 2254(d).

row. Brandley's efforts for a new trial, wherein he can present the evidence Montgomery County had previously suppressed, the new evidence that another person committed the crime, and the recantations of several key prosecution witnesses, are on hold pending resolution of Montgomery County's Petition for Writ of Certiorari.

I.

THE "STATEMENT OF FACTS" AS SET FORTH IN MONTGOMERY COUNTY'S PETITION FOR WRIT OF CERTIORARI IS INCOMPLETE, INACCURATE AND MISLEADING

The "Statement of Facts" section of Montgomery County's Petition for Writ of Certiorari wholly ignores the trial court's findings of fact and the 1700 pages of testimony adduced at the 1987 post conviction evidentiary hearing.[4] Montgomery County disregards the findings of fact and the evidence from the extensive post conviction hearing despite the fact that the opinion of the Texas Court of Criminal Appeals, of which Montgomery County now complains, is based on the trial court's findings of fact from the hearing. Because Montgomery County's "Statement of Facts" ignores the trial court's findings of fact and the due process issues which surfaced after the Texas Court of Criminal Appeals affirmed Brandley's conviction in 1985, the recitation is incomplete, inaccurate, misleading and couched in an apparent attempt to make the 1989 opinion of the Texas Court of Criminal Appeals appear less well reasoned than if Montgomery County had properly revealed all the facts to this Court.

A. STATEMENT OF FACTS

Clarence Brandley's capital conviction was based entirely on circumstantial evidence: there were no eye witnesses and no scientific evidence of any significant proba-

4. Montgomery County even fails to include the trial court's order in its Appendix and Appendices.

tive value. Appendix for Respondent, Exhibit C, at 30. The victim, 16 year old Cheryl Fergeson, was the manager of a girl's high school volleyball team which had traveled to Conroe High School for a scrimmage. *Brandley v. State,* 691 S.W.2d at 701. The primary evidence against Brandley, a janitor at Conroe High School, was the circumstantial testimonial evidence of the other janitors who were present at the school when Cheryl Ferguson was raped and murdered sometime after she left the gym area alone. Appendix for Respondent, Exhibit C, at 30.

The murder occurred at Conroe High School on Saturday, August 23, 1980. *Id.* Classes for the fall term were scheduled to commence in a week. *Id.* The local authorities had announced to a frightened public that they would have a suspect arrested prior to the start of classes. *Id.* The district attorney requested the assistance of Texas Ranger Wesley Styles to head the investigation. *Id.* Styles began his investigation the evening of August 28, 1980, and arrested Clarence Brandley the next day, the Friday before school was scheduled to start. *Id.* at 30-31.

The day after Brandley's arrest, Styles arranged for three of the janitors, Gary Acreman, Sam Martinez and John Sessum, to meet at the high school. *Id.* at 31. Rather than interview each janitor separately, Styles instead conducted a "walk through" wherein the janitors were walked as a group through the sequence of events on the day of the murder, and were questioned in each others presence. *Id.* Of the janitors present, Gary Acreman did most of the talking at the walk through. *Id.*

The consistent testimony of the other janitors was the critical circumstantial evidence against Brandley. *Id.* at 34. The testimony placed Brandley proceeding up the hallway, climbing the stairs to the landing, and then approaching the area of the restrooms and the janitor's closet with rolls of toilet paper in his hands a few minutes

after the victim had taken the same route and entered the ladies restroom. *Brandley v. State,* 691 S.W.2d at 701. The janitor's testimony additionally established that the janitors left the area together, after Brandley had followed the same course which the victim had taken to the area of the restrooms and the janitor's closet, and remained together as a group at another building for approximately the next 45 minutes. *Id.* at 702. The consistent testimony of the janitors therefore served a two fold purpose for the State at trial: the testimony isolated Brandley in an area alone with the victim and additionally kept the remaining janitors together as a group in a location removed from the victim, so that each janitor had an alibi, thereby destroying any reasonable alternative hypothesis that a janitor other than Brandley may have committed the offense. *See Id.* at 702, 704.

Brandley's first trial ended in a mistrial when the jury was unable to reach a verdict. *Id.* at 701. Upon re-trial, the jury convicted Brandley and sentenced him to death. *Id.* On direct appeal, the Texas Court of Criminal Appeals affirmed Brandley's conviction, holding *inter alia,* that the evidence was sufficient because there was no reasonable hypothesis other than Brandley's guilt, based in part upon the fact that the whereabouts of the other janitors was accounted for at the time of the murder.[5] *Id.* at 704, 713.

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5. The court noted that all of the other janitors remained together at another building while Brandley remained alone:

> "The three janitors left. They met Peace as he was coming out of the teacher's lounge, and all four walked across the street to the vocational building. The building was locked; they waited for appellant, who had the keys." *Brandley v. State,* 691 S.W.2d at 702.
>
> . . .
>
> "Appellant was the only janitor whose time was unaccounted for during the critical period when the victim disappeared, and the victim was last seen near in time and in place to where appellant began his solo labor." *Id.* at 704.

Subsequent to affirming Brandley's conviction on direct appeal, the Court of Criminal Appeals entered an order requiring the trial court to conduct an evidentiary hearing regarding the legality of Brandley's conviction. Appendix for Respondent, Exhibit B. The evidence at the hearing revealed, among other things, the falsity of the janitors' consistent testimony at trial. Upon considering those matters which the court did not have the benefit of when reviewing Brandley's case on direct appeal—the trial court's findings of fact based on the evidence presented at the post conviction hearings—the Court of Criminal Appeals set aside the same conviction which they had previously affirmed in 1985. Whereas the Petition for Writ of Certiorari filed by Montgomery County refers only to those facts which the Court of Criminal Appeals considered on direct appeal back in 1985, yet ignores the trial court's post conviction findings of fact which the Court of Criminal Appeals relied upon to set aside Brandley's conviction, the following statement of facts includes the trial court's findings of fact from the evidentiary hearing which the Court of Criminal Appeals found to be supported by "overwhelming evidence". *Ex Parte Brandley,* 781 S.W.2d at 888 n.1.

Janitor John Sessum admitted at the evidentiary hearing that he had lied both in his written pretrial statements and also during his testimony at Brandley's first trial. Appendix for Respondent, Exhibit C, at 33. Sessum lied by going along with Acreman's story that Brandley had followed the victim to the area of the restrooms while all the other janitors left the scene together and remained together for approximately the next 45 minutes at another building. *Id.* Sessum revealed at the post conviction hearing how he and fellow janitors Gary Acreman and Sam Martinez were waiting at the bottom of the hallway steps, prior to the arrival of Brandley, when the victim walked

up the hallway from the direction of the gym. *Id.* at 3. Acreman commented that the victim was "good looking", then told her where the restroom was, and then followed the victim up the stairway, talking to her at the top of the landing.[6] *Id.* at 3, 33.

While Acreman was talking with the victim at the top of the stairs, the girl said "No, No," a couple of times and "Don't" and "Help". *Id.* at 3. Sessum then saw Gary Acreman, accompanied by a man later identified as James Dexter Robinson, grab the girl. *Id.* at 4, 33. Sessum could hear the girl for the next several minutes then her calls for help became quiet. *Id.* at 3. Approximately 5 or 10 minutes after Acreman had grabbed the girl and disappeared with her, Clarence Brandley arrived on the scene and was told not to go into the restroom because there was a girl inside. *Id.* at 4, 33.

Sessum explained that he had lied in his statements and during his trial testimony because both Gary Acreman and Ranger Styles had threatened and intimidated him. *Id.* at 33-34. Acreman drove Sessum home from

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6. After Sessum revealed that Gary Acreman had talked to the girl moments before her death, both Gary Acreman and fellow janitor Sam Martinez admitted at the post conviction hearing that Sessum was telling the truth about Acreman having talked to the victim. Acreman claimed that he had never before revealed that he had talked to the victim because it had completely "slipped his mind" until the post conviction hearing seven years after the murder. It must be noted that Acreman failed to reveal he had spoken to the victim at Brandley's first trial, specifically denied under oath that he had ever spoken to the victim at Brandley's second trial, and failed to mention he had spoken to the victim moments before her death in either of his two sworn pretrial statements. It must additionally be noted that Sam Martinez withheld revealing that Acreman had talked to the victim in both of his sworn pretrial statements, his testimony at both Brandley's first and second trials and his testimony at Brandley's first post conviction hearing in 1986. Like Acreman, Martinez waited seven years to disclose that Acreman had talked to the victim and only admitted to the truth after it had first been revealed by John Sessum. Appendix for Respondent, Exhibit C, at 3, 7, 35.

the high school on the day of the murder. *Id.* at 34. While riding home, Acreman warned Sessum not to tell anyone that he had talked with the girl. *Id.* Acreman also drove Sessum to the police station when Acreman and Sessum gave their first statements and to the school for the walk through, after which they gave additional statements. *Id.* On both occasions Acreman again warned Sessum not to tell anyone he had talked with the girl outside the restroom moments before her murder. *Id.* In March of 1987, shortly after Sessum first revealed Gary Acreman's involvement in the murder, a stranger assaulted Sessum as he was riding his bicycle home from work. *Id.* The stranger first verified that he was John Sessum, punched Sessum and then inquired about the videotape Sessum had made which implicated Acreman in the murder. *Id.*

Sessum also testified at the evidentiary hearing that he was intimidated by Texas Ranger Wesley Styles and was afraid to tell Styles the truth. *Id.* at 33. At one point during the walk through, Sessum tried to tell Styles about Acreman's involvement with the victim but Styles threatened to arrest Sessum if he didn't cooperate. *Id.* Sessum testified that he was still afraid of Ranger Styles at the time of the hearing in 1987. *Id.*

The trial court found, based on John Sessum's demeanor and his answers to questions on direct and cross-examination, and the Court's own questioning, that John Sessum was a credible witness and that his testimony was truthful. *Id.* at 4.

Sessum was not the only janitor threatened and intimidated by Ranger Styles. Henry "Ickie" Peace, the janitor who had been the key State's witness at Brandley's trials, revealed for the first time at the post conviction hearing how Ranger Styles had threatened and mistreated him and how the police had forced him to sign his state-

ment shortly after the murder at the high school. *Id.* at 32. Ranger Styles had appeared at Peace's home sometime after dark. *Id.* Styles then took Peace to a small rural police station and kept him there until 1:30 in the morning. *Id.* While in Style's car enroute to the station, Styles threatened to blow Peace's brains out. *Id.* Styles also roughed-up Peace and threatened him at the station. *Id.* At one point, Styles grabbed Peace by a chain he wore around his neck, twisted the chain and then shoved Peace up against the wall while choking him with the chain. *Id.* The trial court noted how Peace is a very small man, perhaps less than five feet tall, while Styles is a large man, over six feet tall and well built. *Id.* Peace testified that he was afraid of Ranger Styles when Styles interrogated him in 1980 shortly after the murder and that he was still afraid of Styles at the time of the post conviction hearing in 1987. *Id.*

Peace revealed at the post conviction hearing that he had complained to the District Attorney's office that he had been threatened and roughed-up by Ranger Styles. *Id.* at 33. The District Attorney warned Peace that he was "hallucinating" and "imagining things" and that Peace couldn't prove it anyway because it would be his word against the Ranger's. *Id.* The District Attorney never disclosed to defense counsel the *Brady* material that Peace, the State's key witness at Brandley's trial, had informed the District Attorney that he had been threatened and intimidated by the very Ranger whom the District Attorney had selected to lead the investigation. *Id.* Accordingly, defense counsel only first learned of the threats against Peace when Peace testified at the post conviction hearing seven years after Brandley's conviction.

In addition to suppressing the information that the State's key witness had been threatened and intimidated

by a law enforcement officer, the District Attorney, notwithstanding his knowledge that Peace had complained of the threats and mistreatment from Ranger Styles, failed to correct Peace's false testimony at trial when Peace denied, upon cross-examination by defense counsel, that Styles had mistreated him.[7]

Peace additionally revealed at the evidentiary hearing that the police would not allow him to leave the police station until he had signed a written statement, despite his inability to read or write. Appendix for Respondent, Exhibit C, at 32. When Peace asked if his sister or brother could read the statement to him, prior to his signing, the police refused. *Id.* Peace was then left with no alternative but to sign the statement which the police had composed: "I signed a piece of paper that had a bunch of letters on it, bunch of words, I don't know what it said." Evidentiary Hearing Transcript, R. II, 30.

Lorna Hubbell, now a probation officer in Houston, Texas, testified at the evidentiary hearing regarding her interview with Gary Acreman in November of 1980, a few months after the murder at the high school. Appendix for Respondent, Exhibit C, at 4. During her interview, Acreman became extremely nervous when questioned about the events at the high school on the day of the murder and began shaking violently. *Id.* Acreman was very concerned about John Sessum and asked repeatedly, throughout the interview: "What was John saying", about the girl's murder. *Id.* The trial court found that Lorna Hubbell was a credible witness and that her testimony was truthful and unrebutted. *Id.*

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7. The opinion setting aside Brandley's conviction sets forth verbatim Peace's false testimony at trial. *Ex Parte Brandley*, 781 S.W.2d at 894 n. 8. The opinion suggests that the district attorney's failure to correct Peace's false testimony at trial "arguably supports yet another due process violation: The State's use of perjured testimony." *Id.*

Brenda Medina testified at the 1986 post conviction hearing. *Id.* at 12. At the time of the murder at the Conroe High School, she and James Dexter Robinson, a former janitor at the high school who had recently been fired, were living together. *Id.* On the day of the murder, James Dexter Robinson came home sometime after midnight, awakened Ms. Medina and warned her that he had to leave the state because he had killed a girl. *Id.* Robinson assured Medina that he had hidden the girl's body well enough so that no one would find the body until he was out of town. *Id.* When Robinson left town early that morning, he left behind his tennis shoes which had spots of blood on them. *Id.*

Sometime in May of 1986, Brenda Medina first revealed to her attorney, W. B. Etheridge, the substance of Robinson's extra-judicial confession on the evening of the murder. *Id.* Etheridge then immediately informed the District Attorney, Peter Speers. *Id.* The District Attorney failed to disclose to defense counsel Robinson's confession, however, and in fact denied, in open court, that any exculpatory evidence existed. *Id.* The Sunday night before the 1986 evidentiary hearing, Etheridge also informed Clarence Brandley's attorney, Mike DeGeurin. *Id.* Etheridge felt compelled to contact DeGeurin when he discovered that the District Attorney had never disclosed to defense counsel Robinson's extra-judicial confession. *Id.* Had Brenda Medina's attorney not alerted defense counsel, the District Attorney would have succeeded in suppressing the exculpatory evidence of Robinson's confession.

Brandley introduced into evidence at the post-conviction hearing two video tape statements of Gary Acreman. *Id.* at 5. In the first statement dated March 17, 1987, Acreman admits that he did in fact talk with the victim moments before her death, as John Sessum had previously

exposed. *Id.* at 5-6. Acreman did not admit, however, that he had followed the victim up the stairs as she proceeded towards the restroom. *Id.* at 6. Nor did Acreman admit that he had grabbed the girl and dragged her into the restroom. *Id.* Instead, Acreman revealed on his video interview that it was former janitor James Dexter Robinson, not himself, who had followed the girl up the stairs and grabbed her. *Id.* After Robinson had grabbed the girl, she called "No!" and "Help!" as Robinson dragged her into the bathroom. *Id.* According to Acreman, Clarence Brandley was not present when Robinson grabbed the girl and dragged her into the bathroom, but arrived on the scene a few minutes later after her screams for help had been silenced. *Id.* When Brandley arrived, Acreman told him not to go in the restroom because there was a girl inside. *Id.* Acreman did not tell Brandley, however, that the girl had been dragged into the restroom against her will or that Robinson was in the restroom with her. *Id.*

On March 20, 1987, Acreman permitted the videotaping of another interview. *Id.* In the second statement, Acreman reiterates that former janitor James Dexter Robinson grabbed the victim and dragged her into the bathroom before Brandley arrived. *Id.* Acreman additionally reveals that he saw James Dexter Robinson throw the victim's clothes in a dumpster behind the school. *Id.* After hearing testimony from numerous witnesses and assessing their respective demeanors, the trial court found Gary Acreman was in no way coerced or intimidated and that he freely and voluntarily made both the March 17, 1987 and March 20, 1987 video tape statements. *Id.* at 5-7.

In addition to his two video tape statements, Acreman again insisted in a taped telephone conversation with the

district attorney's office that ex-janitor Robinson was present at the high school on the morning of the murder and that Robinson threw clothes into the dumpster where the victim's clothes were eventually found by the Conroe Police Department. *Id.* at 7.

Edward Payne, Gary Acreman's father-in-law, testified at the post-conviction hearing. *Id.* at 9. Payne stated that on the day of the murder, Saturday, August 23, 1980, Acreman came home from his work at the high school and was acting very nervous, was "shaking real bad", and kept pacing back and forth. *Id.* Gary Acreman appeared so completely shaken that Payne thought he was on the verge of a nervous breakdown. *Id.* Acreman then told Payne that a girl had been killed at the high school and that he wanted to go back to the school and help find the girl's clothes. *Id.* Two days later, the Conroe Police Department found the girl's clothes in a plastic bag located in the school dumpster. *Id.* The trial court found that Edward Payne was a credible witness and that his testimony was truthful. *Id.* at 10.

Georgia Cooper, Roger White, and Connie Jane Miller all testified at the post-conviction hearing. *Id.* at 10-11. While at the City Cab Company in Conroe, Texas shortly after the rape and murder at the high school, all three witnesses heard Gary Acreman, who was employed part-time as a cab driver, boast that he knew who had committed the murder and that it wasn't Clarence Brandley. *Id.* The trial court found that Georgia Cooper, Roger White and Connie Jane Miller were credible witnesses and that their testimony was truthful. *Id.*

Cheryl Bradford testified at the evidentiary hearing. *Id.* at 16. Bradford had been a student volleyball player for Waller High School in 1980 and was present at Conroe High School on the day of Cheryl Fergeson's

murder. *Id.* Cheryl Bradford knew Cheryl Fergeson and saw her as they passed in the hallway. *Id.* As they passed, Bradford was returning from the restrooms to the gym and Cheryl Fergeson was headed in the direction of the restroom from the gym area. *Id.* Bradford returned to the gym after she had passed Cheryl Fergeson in the hall. *Id.* Approximately 20 to 30 minutes later, Bradford noticed two men rushing across the top of the bleachers in the gym and then exit a door to the outside of the school. *Id.*

Bradford described the two white males by hair style and color and one of the men by weight and build, and her general description of the two men matched the general description of Gary Acreman and James Dexter Robinson.[8] *Id.*

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8. Regarding Cheryl Bradford's description of the two men, Montgomery County makes the accusation that "The 2majority (sic) has flatly misstated the record" because "the *only* description gi$ven (sic) by Bradford of either of the two men was that one of them was 'thin, average built' " Petition for Writ of Certiorari, at 20, n.9. (all typographical errors and emphasis in original). A review of the record reveals that it is Montgomery County, not the Court of Criminal Appeals for the State of Texas, who has flatly misstated the record. Despite Montgomery County's claim that "Bradford's "only" description is that "one" was "thin, average built", the record reflects that Bradford described both of the men by race, hair style and hair color and one of the men by weight and build:

"Q. [BRANDLEY'S COUNSEL] Let me ask you this: First of all, were they white?

A. [BRADFORD] Yes, sir, *two white guys.*

Q. Would you describe them a little further,

A. Okay. I didn't really get—I didn't get a front view of the two guys. I just saw them from the side. Like I said, I wasn't paying attention to the two guys, but one was, he was *kind of thin, average-built* guy, I guess, with *dark hair,* and it was *longer-type hair.* That was the hair style back then. You wear your *hair to the earlobes then down to about the bottom of the collar.* Then one had *dusty brown hair.* It was *about the same length,* maybe *the dark-haired one was a little longer haired.*" Evidentiary Hearing Transcript, R. II, 102-103.

When Cheryl Bradford returned home on the afternoon of the murder, she told her volleyball coach, Sylvia Ash, that she had some important information that the police should know regarding Cheryl Fergeson's murder. Appendix for Respondent, Exhibit C, at 16. Bradford and her coach then called the Conroe Police Department and reported the information regarding the two men who had rushed through the gymnasium shortly after the approximate time of the murder. *Id.*

While Bradford was watching the "60 Minutes" program during the spring of 1987, she got "chills" when she saw the photograph of James Dexter Robinson shown on the television. *Id.* at 17. Bradford thereafter contacted the authorities to again report the information that she had seen two white males rush through the gym and exit the school. *Id.* The State offered no explanation at the post conviction hearing, or at any other time, why they never pursued Bradford's information nor why it was never disclosed to defense counsel. The trial court found that Cheryl Bradford was a credible witness and that her testimony was truthful. *Id.*

Sam Martinez testified at the evidentiary hearing. *Id.* at 35. He reiterated that Gary Acreman did not really remain in the exclusive company of the other janitors during the approximate time of the murder, but left twice as the janitors waited for Brandley at the vocational building next to the high school. Evidentiary Hearing Transcript, R. X, 1531, 1533, 1541. Acreman first left the group accompanied by Sam Martinez. *Id.* at 1541. When Acreman and Martinez returned, Acreman left a second time alone and entered the high school. *Id.* at 1541-42. When Acreman left the group of janitors the second time and entered the high school alone, Martinez estimated that Acreman may have been gone for as long as 30 minutes. *Id.* at 1539.

Type A Blood was found on the shirt of the victim. Appendix for Respondent, Exhibit C, at 17. Although the victim had Type A blood, the lack of lacerations on her body indicated the blood may have originated from the perpetrator. *Ex Parte Brandley,* 781 S.W.2d at 890. During the course of the murder investigation, the District Attorney learned that Clarence Brandley has Type O blood. Appendix for Respondent, Exhibit C, at 17. The Montgomery County District Attorney resisted all efforts by defense counsel, however, to obtain blood samples from Acreman and the other janitors present when the victim approached the restroom. *Id.* Not until seven (7) years after the murder, when the Attorney General for the State of Texas became concerned about the validity of Brandley's Montgomery County conviction, were blood samples finally obtained from Gary Acreman and James Dexter Robinson.[9] *Id.* at 17, 27. The Attorney General's investigation revealed that both Acreman and Robinson have type A blood. *Id.* at 17, 27-28. The trial court entered a finding of fact that in the circumstantial case against Brandley it would have been important for the jury to have learned that another janitor had the same type blood that had been found on the victim's clothes. *Id.* at 28.

A Caucasian pubic hair was found near the victim's vagina. *Id.* at 21, 28. Tests revealed the hair belonged to neither the victim nor her boyfriend. *Id.* Despite the fact that a Caucasian pubic hair was discovered near the victim's vagina, the District Attorney successfully resisted all efforts by defense counsel to obtain hair samples from Gary Acreman and the other Caucasians who were in the immediate vicinity of the victim moments

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9. The Attorney General for the State of Texas has not endorsed Montgomery County's Petition for Writ of Certiorari.

before her abduction and murder.[10] *Id.* at 17, 21, 28. As the Texas Court of Criminal Appeals noted in its opinion setting aside Brandley's conviction, it would now be futile to finally obtain a hair sample from Acreman and Robinson because the Caucasian pubic hair found near the victim's vagina became lost, along with other trial exhibits, while in the custody of Montgomery County following Brandley's conviction. *Ex Parte Brandley*, 781 S.W.2d at 890 n. 3; Appendix for Respondent, Exhibit C, at 21.

During the autopsy performed on the victim, cotton swabs were used to take fluid samples from the victim's vagina. Appendix for Respondent, Exhibit C, at 26. While the swabs tested positive for sperm, no tests were performed to establish the blood type of the donor. *Id.* No record exists as to when the vaginal swabs were discarded or who discarded them. *Id.* The swabs were not available for examination by defense counsel, however, when requested shortly after the murder. *Id.* An expert in the field of sex crimes investigations from the Homicide Division of the Houston Police Department testified at the Brandley's post conviction hearing. *Id.* at 27. The expert related how it had been standard procedure at the time of the murder in 1980 to preserve the vaginal swabs recovered from the victim of a sexual assault, and that there existed no justification to discard the swabs because through proper testing they could have scientifically excluded suspects based on the blood type, RH factor and other genetic characteristics of the donor of the sperm. *Id.*

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10. Had Montgomery County disclosed to defense counsel Cheryl Bradford's information that two white males had rushed through the gymnasium shortly after the victim's disappearance, the District Attorney might not have succeeded in blocking all defense attempts to obtain hair and blood samples from Acreman and the other janitors. Additionally, had Montgomery County not suppressed Bradford's information, the critical fact of ex-janitor Robinson's presence at the

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

Montgomery County has engaged in a classic example of *ignoratio elenchi* by purposely mischaracterizing the holding of the opinion by the Texas Court of Criminal Appeals. Whereas the Texas court found a due process violation under *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), based on Montgomery County's suppression of favorable evidence, Montgomery County ignores the *Brady* holding and instead contrives a holding it calls "ineffective assistance of police". Petition for Writ of Certiorari, at 22. Montgomery County's apparent motive in manufacturing a preposterous holding is to attempt to obtain certiorari by characterizing the decision in such a manner that the opinion contravenes this Court's decisions, and is in conflict with state courts of last resort and federal courts of appeals.

Without offering any citation to the portion of the opinion referred to, "the holding in the instant case", according to Montgomery County, is:

> "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." *Id.* at 11.

Montgomery County then postulates, again without offering any citation to the opinion, that the Texas court:

> "has imposed upon the State a broad and unprecedented due process obligation to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused." *Id.* at 8.

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high school on the morning of the murder might have been discovered prior to trial, instead of being exposed by Gary Acreman and John Sessum seven (7) years after Brandley's conviction.

Montgomery County complains that the "basic underpinning" of the "holding" of the Texas court is that the "police could have and should have done a better job than they did," and argues that the Texas court therefore created a new category of due process error called "ineffective assistance of police". *Id.* at 22-23.

An analysis of the opinion by the Texas Court of Criminal Appeals exposes the artifice employed by Montgomery County. The Texas court did make note, in considering the totality of the circumstances while making the materiality determination required in a claim under *Brady v. Maryland, supra,* that Montgomery County had failed to properly analyze the victim's vaginal swabs and investigate the fact that a Caucasian pubic hair was found near the victim's vagina and that two white males were observed rushing from the gym shortly after the victim was attacked. Nowhere in its opinion does the Texas Court of Criminal Appeals hold, however, "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." Likewise, the opinion does not "impose upon the state a broad and unprecedented due process obligation", as Montgomery County complains, "to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused." Nor is the "basic underpinning" of the "holding" of the court that "the police could have and should have done a better job than they did", as Montgomery County contends. Granted, the opinion of the Texas Court of Criminal Appeals did not approve of the way Ranger Wesley Styles handled witnesses during his investigation, such as threatening to arrest John Sessum when Sessum attempted to tell the truth and deviate from Acreman's story at the walk-through, or threatening to

blow Henry Peace's brains out and later forcing Peace up against a wall and choking him with the chain he wore around his neck. Nor did the opinion condone the police forcing the illiterate Peace to sign a statement he couldn't read or ignoring the Caucasian pubic hair found near the victim's vagina and the lead that two white males had suspiciously rushed through the gym and out of the school shortly after the victim's disappearance. Nowhere in the opinion, however, does the Texas Court of Criminal Appeals hold that Brandley's due process rights were violated because "the police could have and should have done a better job than they did." While Montgomery County's contention that Brandley's rights were violated by "ineffective assistance of police" may be catchy and clever, it is a gross mischaracterization of the opinion by the Texas Court of Criminal Appeals.

Montgomery County additionally insists that:

> "the Court of Criminal Appeals likewise found that the loss of certain physical evidence violated Brandley's due process rights, even though Brandley did not show, and the Court did not find, the bad faith required by *Arizona v .Youngblood,* 488 U.S. ___, 109 S.Ct. 333 (1988)". Petition for Writ of Certiorari, at 9.

If a reader were to take Montgomery County's statement at face value, without reading the opinion written by the Texas Court of Crimnial Appeals, one would be compelled to conclude two things: first, that the Texas court held that the loss of certain evidence violated Brandley's due process rights and second, that the Texas court cavalierly ignored this Court's holding in *Arizona v. Youngblood, supra,* by dispensing wih the bad faith requirement. Neither is true, however, and Montgomery County has again engaged in intellectual dishonesty. A simple reading of the opinion reveals that the Texas Court

of Criminal Appeals did not find a due process violation based on lost evidence. Nor did the court ignore *Arizona v. Youngblood, supra,* and disregard the necessity of a bad faith finding. In fact, the Texas court specifically acknowledged the necessity for a showing of bad faith:

> "Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not, in and of itself, result in the denial of due process of law. *Arizona v. Youngblood,* ____U.S. ____, 109 S.Ct. 333, 337, 102 L.Ed.2d 281." *Ex Parte Brandley,* 781 S.W.2d at 894.

The Texas Court considered the State's failure to preserve evidence only as one factor of the totality of the circumstances in determining the materiality of Montgomery County's suppression of evidence. Because the Texas Court of Criminal Appeals recognized that State misconduct, such as the suppression of *Brady* material, is more likely to affect the outcome of a trial based solely on circumstantial evidence, the court noted that Montgomery County's refusal to perform certain scientific tests on the available physical evidence contributed to the lack of direct evidence, and therefore strengthened Brandley's claim that Montgomery County's improper conduct was material to the outcome of his trial.

III.

THE TEXAS COURT OF CRIMINAL APPEALS PROPERLY APPLIED THE MATERIALITY TEST IN FINDING A DUE PROCESS VIOLATION UNDER *BRADY V. MARYLAND*

From the very outset of its opinion, the Texas Court of Criminal Appeals made clear that Brandley's case involved the issue of Montgomery County's suppression of exculpatory evidence. The Texas Court identified the

Brady issue in only the second paragraph of the introduction to its opinion:

> "Applicant's petition for writ of habeas corpus raises seven grounds, one of which alleges that the State's investigative procedure violated his right to due process of law and a fundamentally fair trial. One of the facts underpinning that assertion demonstrates that *the State failed to provide appellant's counsel with potentially exculpatory information in the State's possession* that two men were witnessed near the scene of the crime shortly after the victim was last seen alive." *Ex Parte Brandley,* 781 S.W.2d at 887. (emphasis added)

The Texas Court then briefly summarized, in Part I of its opinion, the findings of fact of the trial judge who presided over the post conviction hearing. The court noted the "overwhelming evidence supporting the trial court's findings", one of which included the fact that Montgomery County had failed to disclose to Brandley's counsel that two white males, whose general description matched the general description of janitor Gary Acreman and recent ex-janitor James Dexter Robinson, hurriedly passed through the gym shortly after the victim was last seen alive. *Id.* at 888, 891.

The Court begins Part II of its opinion with a brief overview of the various contexts in which a due process violation may arise during investigation and trial, including the State's failure to correct unsolicited perjury, citing *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), and the State's suppression of evidence favorable to the accused, citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215 (1963).[11] *Ex Parte Brandley,* 781 S.W.2d at 891-92.

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11. Montgomery County claims that nothing in the record implicates the principle of the government's failure to correct perjured

The Court noted the significance of Montgomery County's suppression of the information that a white male meeting Gary Acreman's general description had been observed near the scene of the crime shortly after the victim's death: the information undermines Acreman's trial testimony (since recanted on video tape) that he was at a different building together with the other janitors at the time of the murder, and additionally establishes that there were other suspects to the crime. *Id.* at 892. The Court then acknowledged that Brandley's pleadings have raised a claim under *Brady v. Maryland, supra,* regarding Montgomery County's suppression of this evidence:

> "A review of applicant's pleadings reflects that applicant, albeit inartfully, alleges that this evidence supports a due process claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 which prohibits State suppression of 'evidence favorable to an accused . . . where the evidence is material either to guilt or to the punishment, irrespective of the good faith or bad faith of the proscution." *Id.* at 87, 83 S.Ct. at 1196. *Ex Parte Brandley,* 781 S.W.2d at 892.

After acknowledging that Brandley has raised a *Brady* claim premised upon Montgomery County's suppression of evidence, the court properly identified the materiality test as set forth by this Honorable Court:

> "In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court held that the due process requirements addressed in *Brady,* supra, applied to the suppression of impeachment evidence, and where such evidence was sup-

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testimony. Petition for Writ of Certiorari, at 23. The Texas Court of Criminal Appeals suggested, however, that a due process violation may have arisen when the district attorney failed to correct Henry Peace's false testimony that he was not mistreated by Ranger Styles. *Ex Parte Brandley,* 781 S.W.2d at 894, n. 8.

> pressed, a new trial must be granted where the confidence in the outcome of the trial is undermined. *Bagley,* at 683, 105 S.Ct. at 3383. To require reversal pursuant to a *Brady* claim, however, the State's suppression of evidence must be considered material. Evidence is considered material where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley,* at 682, 105 S.Ct. at 3383 (1985)." *Id.* at 892-93.

Quoting *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the court further recognized that in making the materiality determination, the suppressed evidence "must be evaluated in the context of the entire record", and "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Ex Parte Brandley,* 781 S.W.2d at 893.

Pursuant to the express dictates of *Agurs,* the court then proceeded to evaluate the suppressed evidence in the context of the entire record. *Id.* at 893-94. The court analyzed the walk through of janitors Acreman, Sessum and Martinez, where Acreman did most of the talking, and noted that Ranger Styles threatened to arrest John Sessum when he attempted to reveal Acreman's involvement in the murder. *Id.* at 893. The court further considered how both Acreman and Martinez admitted seven years after Brandley's conviction that their walk through statements and trial testimony were false in that Acreman did in fact speak with the victim moments before her death and that Acreman did not remain at another location in the presence of the other janitors during the period immediately after Acreman had spoken with the victim and the victim was murdered. *Id.* In considering the materiality of the State's suppression that two white males, one generally matching the description of Acreman, were

seen in the vicinity of the murder shortly after the victim was last seen alive, the court reviewed the physical evidence in the record. *Id.* at 894. The court noted that a Caucasian pubic hair was found near the victim's vagina, yet Montgomery County refused to take a hair sample from Acreman and successfully resisted defense efforts to obtain a sample of Acreman's hair for comparison. *Id.* Montgomery County also refused to obtain a blood sample from Acreman even though blood inconsistent with Brandlay's was found on the victim's shirt. *Id.*

Not only did the court note that the evidence against Brandley was entirely circumstantial, the court explained how the State was responsible for the lack of direct evidence by refusing to perform available tests on the physical evidence at hand. *Id.*

After weighing the totality of the circumstances, and after having expressly acknowledged that additional evidence of relatively minor importance might be considered material if the verdict is already of questionable validity, the court sustained Brandley's *Brady* claim, concluding that Montgomery County's investigative procedure violated Brandley's right to due process by suppressing evidence favorable to the accused:

> "Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law *by suppressing evidence favorable to the accused,* and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed." *Id.* (emphasis added)

Perhaps the Texas Court of Criminal Appeals might have drafted an opinion which set forth with more exacting precision its application of the materiality standard

for Brandley's *Brady* claim. Regardless of whether the Texas court might have authored a more sublime opinion, Montgomery County's criticism of the opinion is without merit. For example, Montgomery County boldly claims in its Petition for Writ of Certiorari that "The majority made no attempt to explain how the disclosure to the defense of the evidence discussed above [Cheryl Bradford's testimony that two white males had rushed through the gymnasium shortly after the victim disappeared] even remotely could have affected the outcome of Brandley's trial." Petition for Writ of Certiorari, at 21. A mere reading of the opinion, however, reveals that Montgomery County's allegation is entirely false. On two occasions, the Texas Court of Criminal Appeals expressly explained the significance of Cheryl Bradford's information which Montgomery County had successfully suppressed. Initially, the Court explained that:

> "Bradford's statements undermine the State's theory of the case that applicant was the only janitor whose presence was unaccounted for at the time of, and following the murder. Additionally, this information conflicts with the now recanted trial testimony of Acreman, Martinez and Sessum that they were exclusively in each other's company after the girl entered the restroom."[12] *Ex Parte Brandley,* 781 S.W. 2d at 891 n. 5.

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12. It must be noted that Montgomery County continues to this date to adhere to the theory that Acreman and the other janitors left together for another building, when the victim entered the restroom, and remained exclusively in each other's presence at the approximate time of the victim's disappearance. In the "Statement of facts" section of its Petition for Writ of Certiorari, Montgomery County tells this Court, "the four janitors waited for Brandley on the lawn outside," thereby leaving the impression that none of the janitors left. Petition for Writ of Certiorari, at 6. Montgomery County would lead this Court to believe that all of the janitors remained together waiting despite Sam Martinez's testimony that Acreman in fact left the group twice: the first time with Martinez, and the second time to return alone to the high school where Acreman may have been gone for as long as 30 minutes.

The court then further explains the significance which Cheryl Brandford's information would have had at trial had Montgomery County not successfully suppressed the information:

> "The State's suppression of Bradford's information that she saw a man meeting Acreman's description near the scene of the crime shortly after the victim was attacked undermines Acreman's now recanted testimony that he was in a different building with the other janitors at the time in question. At the very least, it establishes that men other than applicant were near the scene of the crime shortly after the victim was last seen alive. Given Bradford's hearing testimony that she saw no men attending the volleyball tournament at the time in question, this information becomes more significant by establishing other suspects, if not impeaching Acreman's testimony regarding his whereabouts." *Ex Parte Brandley,* 781 S.W.2d at 892.

In an apparent attempt to alarm this Honorable Court, Montgomery County further claims that "following *Ex Parte Brandley,* it appears that in Texas, the cumulation of meritless claims can equate to a due process violation." Petition for Writ of Certiorari, at 21. Again, Montgomery County's allegation is without merit. The Texas Court of Criminal Appeals did not hold that the cumulation of frivolous claims violated Clarence Brandley's right to due process. Nor did the court hold that Brandley's due process rights were violated by "ineffective assistance of police", as also urged by Montgomery County. The Texas Court of Criminal Appeals simply held that Montgomery County violated Clarence Brandley's right to due process by suppressing Cheryl Bradford's information that two white males, whose general description matched the general description of janitor Gary Acreman and recent ex-janitor James Dexter Robinson, rushed through the gymnasium

and left the school building shortly after the victim was last seen alive.

IV.

THE TEXAS COURT OF CRIMINAL APPEALS DID NOT ANNOUNCE A NEW CONSTITUTIONAL RULE ON COLLATERAL REVIEW

Montgomery County complains that the court's "ineffective assistance of police" holding applies a new rule of federal constitutional law on collateral review. This complaint is without merit. As previously discussed in Part II, the Texas Court of Criminal Appeals did not hold, as claimed by Montgomery County, "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." Petition for Writ of Certiorari, at 11. Nor did the court impose upon the State, as Montgomery County fears, "a broad and unprecented due process obligation to perform an investigation that pursues every lead, conducts all conceivable tests, and preserves all evidence, even though the evidence available to the police points only to the accused." *Id.* at 8. Putting aside Montgomery County's mischaracterization of the opinion, the decision of the Texas Court of Criminal Appeals is neither novel nor a new application of federal constitutional law. The court simply held that Montgomery County violated Brandley's due process rights under *Brady v. Maryland, supra,* by suppressing the information that two white males, whose general description matched the general description of janitor Gary Acreman and ex-janitor James Dexter Robinson, were seen suspiciously rushing through the gymnasium shortly after the victim was last seen alive, when, in light of the totality of the circumstances: the case against Brandley consisted of only circumstantial evidence; a Caucasian pubic hair not belonging to the victim or her

boy friend was found near the victim's vagina; type A blood not matching Brandley's type O blood was found on the victim's shirt (Acreman and Robinson were later discovered to have type A blood seven years after Brandley's conviction); and the State advanced the theory at trial that Brandley was the only person who could have possibly committed the crime because the four other janitors exclusively remained in each other's company at another building at the time of the murder.

CONCLUSION

There are no special and important reasons to grant Montgomery County's Petition for Writ of Certiorari. The decision by the Texas Court of Criminal Appeals properly applied the materiality test in finding a due process violation under *Brady v. Maryland, supra,* by considering the totality of the circumstances, including the trial court's findings of fact based on the extensive post conviction hearings.

The Texas Court of Criminal Appeals did not decide a federal question in a way that conflicts with the applicable decisions of this Court. Nor did the Texas Court of Criminal Appeals decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Respondent, Clarence Lee Brandley, respectfully prays that this Court refuse to grant Montgomery County's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals.

Respectfully submitted,

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